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### The Same-Sex Marriage Cases and Federal Jurisdiction: On Third-Party Standing and Why the Domestic Relations Exception to Federal Jurisdiction Should Be Overruled

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# The Same-Sex Marriage Cases and Federal Jurisdiction: On Third-Party Standing and Why the Domestic Relations Exception to Federal Jurisdiction Should Be Overruled

STEVEN G. CALABRESI\* & GENNA L. SINEL\*\*

*In this paper, we consider two questions. First, we address whether there was proper standing for the Article III courts to decide *United States v. Windsor*, 570 U.S. 133 S. Ct. 2675, 2696 (2013) and *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013). We conclude that the third-party appellants lacked standing in federal court. Second, we examine whether cases challenging state same-sex marriage bans were and are cases in “law and equity” or instead, barred under the domestic relations exception for the purposes of federal question jurisdiction. We conclude that the domestic relations exception to federal jurisdiction is an archaic, historical remnant that should be overruled by the U.S. Supreme Court, and thus, the Article III federal courts have jurisdiction to hear pure marital status cases despite their*

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\* Clayton J. and Henry R. Barber Professor of Law, Northwestern University and Visiting Professor of Political Science, Brown University 2010–18. We would like to thank Gary Lawson, Michael McConnell, Jim Pfander, Robert Pushaw, Marty Redish, and Kate Shaw for their helpful suggestions and comments on this article. We especially want to thank Bradley Silverman, my co-author on another article and on a Comparative Constitutional Law casebook, for his comments, which were especially helpful. All opinions expressed herein are only our own personal opinions and should not be attributed to the persons we thank or to anyone else.

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*domestic nature. We call on the Supreme Court to eliminate the domestic relations exception as to all forms of federal jurisdiction.*

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## INTRODUCTION

Before the ruling in *Obergefell v. Hodges*,<sup>1</sup> the U.S. Supreme Court took action to legalize same-sex marriage. The Court struck down the federal Defense of Marriage Act (“DOMA”) in *United States v. Windsor*,<sup>2</sup> and then, in *Hollingsworth v. Perry*,<sup>3</sup> the Supreme Court allowed a lower court ruling to go into effect that deemed same-sex marriage bans unconstitutional. However, the holdings in *Windsor* and *Hollingsworth* reveal a tension in the Court’s interpretation of standing. In both cases, a third party attempted to appeal a lower court ruling, but only in *Windsor* was the third party found to have met the standing requirement.<sup>4</sup>

In *Hollingsworth*, Chief Justice Roberts’s majority opinion held that several proponents of a California proposition lacked standing to appeal the lower court order, given that the Attorney General and Governor of California agreed that the proposition in question was unconstitutional.<sup>5</sup> Similarly, in *Windsor*, President Obama agreed with the Second Circuit ruling below that the federal government had acted unconstitutionally in defining marriage exclusively as the union of one man and one woman;<sup>6</sup> however, unlike the ruling in *Hollingsworth*, the Court found standing for the Bipartisan Legal Advisory Group (“BLAG”) of the U.S. House of Representatives to

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<sup>1</sup> 135 S. Ct. 2584 (2015).

<sup>2</sup> 133 S. Ct. 2675, 2696 (2013) (“DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, . . . that [same-sex] marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

<sup>3</sup> 133 S. Ct. 2652, 2668 (2013) (“Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.”).

<sup>4</sup> See *Windsor*, 133 S. Ct. at 2684–89; *Hollingsworth*, 133 S. Ct. at 2667–68.

<sup>5</sup> See *Hollingsworth*, 133 S. Ct. at 2660, 2667–68.

<sup>6</sup> See *Windsor*, 133 S. Ct. at 2684.

defend DOMA.<sup>7</sup> Chief Justice Roberts and Justices Scalia and Thomas dissented here, on the grounds that, first, the President had no standing to appeal a Second Circuit ruling with which he agreed, and second, that BLAG lacked standing to appeal as a third party to the case.<sup>8</sup>

As a matter of standing, we agree with Chief Justice Roberts's majority opinion in *Hollingsworth* and Justice Scalia's dissent in *Windsor*. Private busybodies lack standing in federal court to defend statutes denied defenses by federal or state executive officials. Nonetheless, we disagree with the four conservative Justices on the U.S. Supreme Court on the merits of the same-sex marriage issue and agree with Justice Anthony M. Kennedy's decision in *Windsor* and *Obergefell* that DOMA and state bans on same-sex marriage are unconstitutional.

There remains the issue of the domestic relations exception to federal jurisdiction. The federal jurisdictional problems with cases challenging the constitutionality of same-sex marriage bans are much more complex than is even recognized in the conservative Justices' opinions in *Windsor* and *Hollingsworth*. There is a serious question under current case law as to whether the federal courts have either federal question jurisdiction or diversity jurisdiction to decide any *pure* same-sex marriage cases.<sup>9</sup> This dilemma stems from the longstanding domestic relations exception to federal jurisdiction that goes back to the founding of the Republic; pure marriage-law cases cannot be heard in federal court.<sup>10</sup> We conclude that the domestic relations exception to federal jurisdiction ought to be read as not applying to marital-status cases. Instead, we would confine the exception to purely religious matters, such as excommunication.

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<sup>7</sup> See *id.* at 2684–85, 2689.

<sup>8</sup> See *id.* at 2698 (Scalia, J., dissenting).

<sup>9</sup> See, e.g., *Chevalier v. Barnhart*, 803 F.3d 789, 804 (6th Cir. 2015) (determining that the domestic relations exception did not bar the Appellant from commencing an action in diversity against her female partner).

<sup>10</sup> See, e.g., *Ankenbrandt v. Richards*, 504 U.S. 689, 697–701, 703 (1992); *In re Burrus*, 136 U.S. 586, 593–94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”). See generally Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1822 (1995) (“The domestic relations exception reflected the view that family law constituted a distinctly communitarian endeavor, a subject reflecting locally shared values and norms.”).

A. *Pure Marriage Laws and the Question of "Cases in Law or Equity"*

The U.S. Constitution and the federal statutes on diversity and federal question jurisdiction all employ the terminology "cases in law or equity" in their grants of federal jurisdiction to the Article III courts. Accordingly, the federal courts are restricted to hearing cases that fall under that category. The scope of the domestic relations exception becomes relevant when trying to assess whether cases revolving *purely* around questions of marital status can be considered as "cases in law or equity," and can thereby be heard in federal court. When state laws criminalized same-sex marriage, there was no federal jurisdiction issue because criminal cases were law-or-equity suits. However, cases challenging the federal constitutionality of state laws that only define the status of marriage are not so definitively determined, leaving room for debate as to whether such cases were appropriately be heard in federal court.

In England during 1787, "Cases in Law and Equity" was a legal term of art that encompassed only those cases that were brought before the Courts of Law (the Court of King's Bench or the Court of Common Pleas) and the Courts of Equity (the Court of Exchequer or the Court of Chancery).<sup>11</sup> At the time, matrimonial causes were only heard in the Ecclesiastical Courts of the Church of England, and it was not until the passage of the Matrimonial Causes Act of 1857 that the ordinary English courts were empowered to hear matrimonial and divorce cases.<sup>12</sup> This was partly because, prior to 1857, marriage in England was considered to be a strictly religious sacrament and not a contract.<sup>13</sup> Marriage was similarly viewed in the United States when Article III was enacted.<sup>14</sup>

By 1868, however, when the Fourteenth Amendment was adopted, the idea of marriage had evolved. Marriage was thought of as both a sacrament and a contract, as Andrea Matthews and Steven

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<sup>11</sup> For a general discussion regarding the Courts of Law and the Courts of Equity, see generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97-116 (4th ed. 2002).

<sup>12</sup> See Hazel D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay*, 11 S. CAL. REV. L. & WOMEN'S STUD. 1, 12, 16-17 (2001).

<sup>13</sup> See *id.* at 4.

<sup>14</sup> See Dailey, *supra* note 10, at 1821 ("From the earliest days of the Republic . . . , family law has unquestionably belonged to the states.").

Calabresi argue in their article, “Originalism and *Loving v. Virginia*,” and Article III had been the “Supreme Law of the Land” for seventy-nine years.<sup>15</sup> Under Article III, matrimonial causes were not “cases in law and equity,” and, although the Fourteenth Amendment created new rights, it did not add to the Article III jurisdiction of the federal courts, which mandated that *pure* matrimonial causes (or domestic relations cases, as called by modern-day courts) be adjudicated exclusively in state courts.<sup>16</sup> Consequently, many contend that a Fourteenth Amendment argument against same-sex marriage bans can only be addressed by state courts, each state determining for itself how the Fourteenth Amendment is to be understood within its own borders.<sup>17</sup> Under this reasoning, the Supreme Court would not have had jurisdiction to overturn state bans on same-sex marriage in *Obergefell* in June of 2015.

We conclude that the U.S. Supreme Court ought to overrule the so-called domestic relations exception to federal jurisdiction. We make this argument while noting that under American federalism, the law of marriage and divorce is in “pith and substance” a question of state law and not one of federal law.<sup>18</sup> In our opinion, DOMA was unconstitutional because Congress did not have the enumerated

<sup>15</sup> See generally Calabresi & Matthews, *supra* note 15, at 1413–24.

<sup>16</sup> See Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 150–52, 165–66 (2009). See generally, U.S. CONST. art. III, § 2, cl. 1 (“The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

<sup>17</sup> See generally Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 852–53 (2014) (“[I]t was nearly impossible for gay rights advocates to persuade courts that the Fourteenth Amendment prohibited discrimination on the basis of sexual orientation. . . . After *Bowers*, courts consistently rejected homosexual equality claims on the ground that ‘[i]t would be quite anomalous . . . to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.’”).

<sup>18</sup> *Reference re Securities Act*, 2011 SCC 66, 3 S.C.R. 837 (2011) (discussing the pith and substance test in Canadian federalism cases). The Canadian Supreme Court and, prior to 1949, the Judicial Committee of the Privy Council sitting in London, England, have long decided Canadian federalism cases by asking whether a statute is “in pith and substance” a matter of Canadian federal law or a matter of Canadian provincial law. *Id.* We think this doctrine is a very useful one, and we would urge the U.S. Supreme Court to apply the “pith and substance” test in U.S. federalism cases.

power to adopt a federal marriage statute. It thus may seem to follow that the very same Constitution, which leaves the definition of marriage to the states, would also prohibit the Article III federal courts from hearing matrimonial causes or domestic relations cases. However, we reject that argument and demonstrate that an originalist understanding of the word “equity” supports the exercise of judicial power to extend federal jurisdiction over domestic relations.

### B. *Our Framework*

In this article, we argue that Chief Justice Roberts and Justice Scalia were right on the federal jurisdictional issues in *Windsor* and *Hollingsworth*. In Part I, we maintain that, first, litigants cannot appeal decisions with which they agree, and second, that private busybodies in the House of Representatives lack standing to appeal a ruling legalizing same-sex marriage under federal law. In Part II, we expand on that argument and explain why third parties lack standing to defend the constitutionality of state-adopted initiatives when the executive branch of the state governments so decline.

Finally, in Part III, we discuss the much broader federal jurisdictional problems with lawsuits like *Windsor* and *Hollingsworth* alluded to in this introduction. The case in *Hollingsworth*, in particular, could be argued to be absolutely not one in law or equity that could be heard by Article III federal courts. Nevertheless, after considering this argument at some length, we reject this idea and conclude that Article III’s grant of equity jurisdiction has inherent evolutive meaning, and hence may expand to cover deficiencies in the law. In today’s world, the federal courts’ jurisdiction over cases in equity arising under federal law is best understood as encompassing marital-status lawsuits, like the various same-sex marriage cases decided on the merits by federal courts of appeals. Thus, we close this article by calling on the U.S. Supreme Court to eliminate the lingering features of the domestic relations exception to federal jurisdiction.



# I. THE THIRD-PARTY APPELLANTS IN *WINDSOR* LACKED STANDING IN FEDERAL COURT

## A. *Windsor* Facts and DOMA

In *United States v. Windsor*,<sup>19</sup> the Obama Administration sought to appeal a Second Circuit holding with which it agreed to the effect that DOMA was unconstitutional.<sup>20</sup> The Administration argued that since it was continuing to enforce DOMA<sup>21</sup> and had been ordered to pay Windsor a tax refund, it suffered sufficient legal injury to permit an appeal of the Second Circuit’s legal ruling, despite agreeing with the holding on the merits.<sup>22</sup> To understand the Administration’s claim, it is necessary to describe the background and procedural posture of the *Windsor* case.

DOMA was adopted in 1996.<sup>23</sup> Section 3 of the Act amended the Dictionary Act to provide for a federal definition of the words “marriage” and “spouse” wherever they appeared in the U.S. Code.<sup>24</sup> Under DOMA, the word “marriage” in federal law was defined to mean “only a legal union between one man and one woman as husband and wife . . . .”<sup>25</sup> Edith Windsor and Thea Spyer were both women, and they married in Canada in 2007.<sup>26</sup> They lived together in New York State, where same-sex marriage was legal, and the state accepted the legality of their Canadian marriage.<sup>27</sup>

Spyer died in February 2009, and she left her estate to Windsor.<sup>28</sup> Because of DOMA, “Windsor did not qualify for the marital

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<sup>19</sup> 133 S. Ct. 2675 (2013).

<sup>20</sup> *See id.* at 2684.

<sup>21</sup> Defense of Marriage Act (DOMA) of 1996, Pub. L. 104-199, 110 Stat. 2419, *by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (amending 1 U.S.C. § 7 and 28 U.S.C. § 1783C); *see* 1 U.S.C. § 7 (2012), *amended by* DOMA, 110 Stat. at 2419–20, *and invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013); 28 U.S.C. § 1783C (2012), *amended by* DOMA, 110 Stat. at 2419, *and invalidated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>22</sup> *See Windsor*, 133 S. Ct. at 2684–86.

<sup>23</sup> *See* DOMA, 110 Stat. at 2419.

<sup>24</sup> *See* DOMA § 3 (amending 1 U.S.C. § 7).

<sup>25</sup> *Id.*

<sup>26</sup> *Windsor*, 133 S. Ct. at 2683.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

exemption from the federal estate tax,” so she paid \$363,053 in federal inheritance taxes and sought a subsequent refund from the Internal Revenue Service (“IRS”).<sup>29</sup> The IRS denied her request, also because of DOMA.<sup>30</sup> Windsor then sued the United States in the Southern District of New York, contending that DOMA was unconstitutional.<sup>31</sup> The Obama Administration “notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s § 3”; however, the President did direct his administration to continue DOMA’s enforcement.<sup>32</sup> The stated rationale for this order was to facilitate judicial review of DOMA’s constitutionality.<sup>33</sup> Consequently, BLAG voted to intervene in this case in order to defend the constitutionality of § 3 of DOMA.<sup>34</sup> The district court allowed BLAG to intervene as an interested party.<sup>35</sup>

*B. Windsor’s Federal Standing: An Exception to the General Taxpayer Rule*

In the 1920’s the United States Supreme Court established the general rule that taxpayers do not have standing in federal court to challenge the constitutionality of a tax or expenditure of government funds.<sup>36</sup> The Court’s decision rejects taxpayer standing where there is no particularized, individual legal injury.<sup>37</sup> This case reaffirms that the federal courts do not sit to correct generalized grievances and that not all deprivations of constitutional rights can be litigated in federal court. Though the federal courts have the power to protect rights that were recognized at common law or in the English Courts of Exchequer or Chancery, they are not ombudsmen with a general charter to police and enforce the Constitution.<sup>38</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2683–84; *see also* 28 U.S.C. § 530D(a) (2012).

<sup>33</sup> *See Windsor*, 133 S. Ct. at 2684.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See Massachusetts v. Mellon*, 262 U.S. 447 (1923).

<sup>37</sup> *See id.* at 480.

<sup>38</sup> On several occasions, federal courts of various levels have made clear that their role in the American system of governance is of a limited nature. *See, e.g.,*

The Constitution presumes that generalized grievances suffered equally by all taxpayers will be remedied by the political branches of the government.<sup>39</sup> A court ruling in favor of a single taxpayer like Frothingham, who had challenged the constitutionality of a federal spending program, would be considered an advisory opinion, which is a judgment that does not enforce specific change, but rather advises on the constitutionality or interpretation of a law.<sup>40</sup> Under Article III, the courts are not empowered to issue advisory opinions, and a judicial decision in Frothingham's favor would have been purely speculative as to whether the ruling would have resulted in any actual change in Frothingham's federal tax bill.

The Court's lack of power to issue advisory opinions is long established and rooted in early American history. In an episode known as the Correspondence of the Justices,<sup>41</sup> the U.S. Supreme Court was asked to give Secretary of State Thomas Jefferson legal advice about various abstract matters pertaining to U.S. foreign relations.<sup>42</sup> The Supreme Court politely declined Jefferson's invitation, saying that it lacked the power to adjudicate an issue unless there was a real,

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Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 487 (1982) ("The federal courts were simply not constituted as ombudsmen of the general welfare."); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 499 (6th Cir. 2004) ("[T]he Supreme Court has specifically rejected the idea that the Constitution permits federal courts to adjudicate claims brought by . . . the 'self-appointed Establishment Clause police' . . ."); *Mazaleski v. Treusdell*, 562 F.2d 701, 722 (D.C. Cir. 1977) ("Our legitimate role in a case such as this is necessarily a limited one. We must apply the Constitution, while carefully avoiding the temptation to act as ombudsmen . . .").

<sup>39</sup> See *Mellon*, 262 U.S. at 482 ("But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the states where they reside.").

<sup>40</sup> See *id.* at 485 (Thompson, J., concurring) ("[T]his court is as much without authority to pass abstract opinions upon the constitutionality of acts of Congress as it [is] . . . of state statutes.").

<sup>41</sup> MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 501–03 (2d ed. 2013) (discussing and reproducing the Correspondence of the Justices).

<sup>42</sup> *Id.*

concrete controversy among legally adverse parties.<sup>43</sup> In another episode from the 1790s, known as *Hayburn's Case*,<sup>44</sup> most of the U.S. Supreme Court Justices held that they lacked power under Article III to review judicially determined veterans' pensions when the amounts in question could be raised or lowered by an executive branch official following the judicial review.<sup>45</sup> In other words, Justices could only hear cases for which a judicial ruling would be significantly likely to affect the concrete resolution for the involved parties.<sup>46</sup>

It follows that the federal courts are empowered to hear only real and concrete disagreements between adverse litigants when there is a substantial likelihood that the judicial resolution of such disputes would impact the litigants.<sup>47</sup> The injury suffered by Frothingham was not an injury that could be redressed by federal judicial action, nor was the injury in *Massachusetts v. Mellon*.<sup>48</sup> Thus, States, like individual citizens, have no legal right under the Constitution to sue

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<sup>43</sup> *Id.*

<sup>44</sup> 2 U.S. 409 (1792); see also PAULSEN ET AL., *supra* note 52, at 496–501 (discussing *Hayburn's Case*, 2 U.S. 409).

<sup>45</sup> *Hayburn's Case*, 2 U.S. at 409, 413–14 n.4.

<sup>46</sup> In *Flast v. Cohen*, 392 U.S. 83 (1968), the U.S. Supreme Court made an exception to its rule against taxpayer standing in cases where a violation of the Establishment Clause was alleged. Many thought at the time that this was the opening salvo in an effort by the Warren Court to abolish standing doctrine across the board. The replacement of the Warren Court by the Burger and Rehnquist Courts left the traditional ban against taxpayer standing in place while allowing a *Flast v. Cohen* exception for Establishment Clause cases only. The Roberts Court appears to be close to overruling *Flast v. Cohen*, the reach of which it has greatly circumscribed. See *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436 (2011).

<sup>47</sup> See, e.g., *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (“[T]he emphasis in standing problems is on whether the party invoking federal court jurisdiction has ‘a personal stake in the outcome of the controversy,’ and whether the dispute touches upon ‘the legal relations of parties having adverse legal interests.’” (first quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962); and then quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937))).

<sup>48</sup> See *Massachusetts v. Mellon*, 262 U.S. 447, 478–80 (1923) (holding that the Court did not have jurisdiction to consider the constitutionality of the Maternity Act when no rights of the state were brought within the actual or threatened operation of the statute).

in federal court for the purpose of challenging the general constitutionality of federal spending programs.

The distinction between *Frothingham* and *Windsor* is that Windsor did suffer a particularized, individual legal injury on account of § 3 of DOMA.<sup>49</sup> Unlike similarly situated married, heterosexual spouses, Windsor had to pay \$363,053 in federal inheritance taxes as a result of DOMA's exclusive definition of "marriage."<sup>50</sup> Windsor's injury was, therefore, not generally suffered by all taxpayers, and her payment of the tax could be resolved by actual remedy through a court order in her favor. For this reason, *Windsor* was an exception to the general rule against taxpayer standing, and she did have standing to challenge § 3 of DOMA in the district court.

### C. The Obama Administration's Lack of Federal Standing

The district court ruled in Windsor's favor and held that § 3 of DOMA was unconstitutional.<sup>51</sup> The Obama Administration agreed, but appealed to the Second Circuit, apparently hoping to lose in a larger jurisdiction.<sup>52</sup> The Second Circuit agreed that § 3 of DOMA was unconstitutional and affirmed, and the Obama Administration appealed again,<sup>53</sup> this time to the U.S. Supreme Court, hoping to finally lose nationwide. The actions of the Obama Administration raise the question of whether a litigant can appeal a court judgment that he or she finds to be legally correct on the basis that complying with the judicial ruling would impose financial costs on the litigant.

As exhibited by the Correspondence of the Justices, the federal courts have jurisdiction to hear only certain categories of "cases" and "controversies,"<sup>54</sup> which involve legally adverse parties at all stages of litigation, including on appeal.<sup>55</sup> In *Windsor*, the United States did not comply with the Court's order that it pay Windsor a tax refund, though it agreed that Windsor was legally entitled to the

<sup>49</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2684–85 (2013).

<sup>50</sup> *Id.* at 2683–84.

<sup>51</sup> See *Windsor v. United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd* 133 S. Ct. 2675 (2013).

<sup>52</sup> See *Windsor v. United States*, 699 F.3d 169, 176–77 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

<sup>53</sup> See *Windsor*, 133 S. Ct. at 2684–86.

<sup>54</sup> U.S. CONST. art. III, § 2.

<sup>55</sup> See PAULSEN ET AL., *supra* note 52, at 501–03.

refund.<sup>56</sup> The majority in *Windsor* held that this was sufficient to give the United States standing to appeal the district court's and Second Circuit's orders.<sup>57</sup> As Justice Kennedy said:

The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is 'a real and immediate economic injury,' indeed as real and immediate as an order directing an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. . . . Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction.<sup>58</sup>

The majority argued that the financial cost of the refund sufficed as an injury incurred by the United States, satisfying the prerequisite of "controversy";<sup>59</sup> however, this argument is flawed because the United States did not take the position that it was legally injured by the district court's or Second Circuit's orders to refund Windsor. Though there did exist a controversy between the United States and Windsor because the Obama Administration refused to follow the law as ordered by the courts, there was no controversy between the parties over what the law entailed. Both parties agreed that the United States was legally obligated to pay Windsor \$363,053, and there is no federal judicial power to review the correctness of a district court's decision unless the United States explicitly asks the court to do so. Here, the United States did not make such a request of the Court.

The United States' failure to follow through with obeying the district court's judgments may have created enough adverseness to support appellate jurisdiction to issue a writ of mandamus directing

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<sup>56</sup> See *Windsor*, 133 S. Ct. at 2684–86.

<sup>57</sup> *Id.* at 2688–89.

<sup>58</sup> *Id.* at 2686 (citation omitted).

<sup>59</sup> See *id.* at 2685–86.

the government to pay Windsor. That Windsor was injured by the United States' failure to pay means that there was federal judicial power to enforce the district court's judgment.<sup>60</sup> Nonetheless, it does not follow that such a failure would have also created jurisdiction for the Court to revisit the question of whether the United States' denial of the refund was constitutional. Accordingly, there was no case or controversy here. *Windsor* was a feigned case by the Obama Administration seeking an advisory opinion, just like the Correspondence of the Justices and *Hayburn's Case*.

As Justice Scalia pointed out in his dissent, the majority erred because it assumed it is the province and duty of the judiciary to *always* declare the law,<sup>61</sup> as asserted in *Marbury v. Madison*.<sup>62</sup> However, the statement in *Marbury* was made in the context of the U.S. Supreme Court having to decide a bona fide case or controversy that was already properly before the Court.<sup>63</sup> In the setting of such a bona fide case or controversy, it is indeed the province and duty of the judiciary to determine the law. Nevertheless, the issue in *Windsor* was whether such a bona fide case or controversy even existed, so the *Marbury* dicta could not apply.

The majority also assumed that the federal courts have jurisdiction to adjudicate *any* question of United States constitutional meaning, and, as Justice Scalia argued, this concept, too, is mistaken.<sup>64</sup> As is made clear in *Frothingham* and *Mellon*, there are many questions of constitutional meaning that are not justiciable by the federal courts and that, therefore, must be left to the political branches of government.<sup>65</sup> American-style judicial review does not empower the

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 2697–2703 (Scalia, J., dissenting) (“We have no power to decide this case.”).

<sup>62</sup> 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>63</sup> *See id.* at 147–49.

<sup>64</sup> *See Windsor*, 133 S. Ct. at 2697–2703 (Scalia, J., dissenting).

<sup>65</sup> *See, e.g.,* *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 600 (2007) (Alito, J.) (“Because the interests of the taxpayer are, in essence, the interests of the public at large, deciding a constitutional claim based solely on taxpayer standing ‘would be[,] not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.’” (alteration in original) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923))); *see also* *Lujan v. Defs. of Wild-*

United States Supreme Court to enforce or interpret the Constitution in the way that constitutional courts are so empowered in Germany or in other foreign nations.<sup>66</sup> There is no judicial review clause or constitutional interpretation clause in the U.S. Constitution, and Article III empowers the federal courts to decide only “cases” or “controversies” using the “judicial” power.<sup>67</sup> *Windsor* did not present a case or controversy about § 3 of DOMA because the United States agreed with the judgments delivered by the courts below, and there is no standing for a party to appeal a court judgment with which it agrees, seeking to lose again on appeal in a grander arena.

#### D. *BLAG’s Lack of Federal Standing*

##### 1. THE U.S. CONSTITUTION DOES NOT PROVIDE FOR LEGISLATIVE STANDING

Justice Alito agreed with Justice Scalia that the Obama Administration lacked standing to appeal *Windsor*, but he took the position that BLAG had standing to appeal the Second Circuit’s judgment because a majority of the House of Representatives approved the appeal.<sup>68</sup> Justice Alito asserted that each House of Congress has a

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life, 504 U.S. 555, 559–66, 576 (1992) (denying standing to environmental protection groups challenging a regulation of the Secretary of the Interior for failure to sufficiently assert personal injury, and noting that “[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive” (emphasis in original)); *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) (“[T]he courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question ‘only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.’”).

<sup>66</sup> See Ronald L. Watts, *The Political Use or Abuse of Courts in Federal Systems*, 42 ST. LOUIS U. L.J. 509, 514–19 (1998).

<sup>67</sup> See U.S. CONST. art. III, § 2.

<sup>68</sup> See *Windsor*, 133 S. Ct. at 2711–14 (Alito, J., dissenting). In this view, the case involved three parties, two of which are the United States: the House of Representatives v. *Windsor* and the Executive Branch. While the President found DOMA unconstitutional, the House of Representatives disagreed and fought for DOMA’s defense. However, the power to defend federal legislation in court lies outside the power of Congress for good reason. A power for Congress to defend its own laws would upset the balance of powers laid out by the Constitution. The principle of the separation of powers is essential to our country’s foundation, as



judicially cognizable interest in defending the constitutionality of federal laws in federal court when the President finds the laws unconstitutional and declines their enforcement.<sup>69</sup> In this way, Justice Alito seemingly shares in Justice Kennedy's presumption that federal courts have the same power enjoyed by constitutional courts in other countries to interpret and enforce the Constitution in all contexts, and this view is deeply mistaken.

The United States federal courts were not set up to be constitutional ombudsmen, or public advocates charged with investigating and addressing complaints of maladministration. There is no clause in Article III that can be plausibly read to be so empowering, as Article III grants to federal courts the power to hear six enumerated categories of controversies, including controversies to which the United States is a party and controversies among two or more states. The six controversies stipulated in Article III, Section 2 are as follows:

The Judicial Power shall extend . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>70</sup>

Conspicuously missing from this list are controversies between either House of Congress and the President as to whether a law is constitutional. By enumerating the categories of cases that federal courts have the power to hear, Article III deliberately withholds jurisdiction over other types of controversies, including controversies

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Madison said in Federalist No. 47: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty . . . ." THE FEDERALIST NO. 47, at 271 (James Madison) (Am. Bar Ass'n ed., 2009).

<sup>69</sup> See *Windsor*, 133 S. Ct. at 2712–14 (Alito, J., dissenting).

<sup>70</sup> U.S. CONST. art. III, § 2, cl. 1.

arising when the Executive declines to defend the constitutionality of a federal law.<sup>71</sup>

Many foreign constitutions provide for the standing of individual legislators or a certain number of legislators to challenge the constitutionality of a law or an executive-branch action, but the U.S. Constitution does not so provide. Consider, for example, Article 93 of the German Basic Law, which sets out the jurisdiction of the German Constitutional Court. Article 93 explicitly states:

The Federal Constitutional Court shall rule:

. . . .

2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one fourth of the Members of the Bundestag;

. . . .

3. in the event of disagreements concerning the rights and duties of the Federation and the Länder, especially in the execution of federal law by the Länder and in the exercise of federal oversight;

4. on other disputes involving public law between the Federation and the Länder, between different Länder, or within a Land, unless there is recourse to another court;

4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority . . . .<sup>72</sup>

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<sup>71</sup> See *Expressio unius est exclusion alterius*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The expression of one thing is the exclusion of another.").

<sup>72</sup> GRUNDGESETZ [GG] [BASIC LAW], Article 93, translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

The German Basic Law differs from Article III of the U.S. Constitution by explicitly empowering one fourth of the members of the Bundestag, the lower House of the German parliament, to sue in the Constitutional Court when a question arises regarding the constitutionality of a federal law.

Similarly, under French law, sixty members of either the Senate or the National Assembly have standing to challenge the constitutionality of a proposed law before the French Constitutional Council. Article 61 of the French Constitution of the Fifth Republic explicitly provides that: “Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.”<sup>73</sup>

The French and German constitutions are thus quite clear in providing legislators with standing to raise constitutional challenges before their respective constitutional courts. However, there is no analogous clause in Article III of the U.S. Constitution granting federal courts this power.

Precedent also demonstrates that the U.S. Supreme Court does not generally review cases like those suggested by Justice Alito. In *Raines v. Byrd*, the Court held that individual members of Congress lacked standing to bring constitutional challenges,<sup>74</sup> and in his concurrence in *Goldwater v. Carter*, Justice Powell stated that a suit brought by a single member of the Senate was not even ripe because there was no controversy between the President and the Senate until the latter, by majority action, brought suit.<sup>75</sup> If the Executive fails to fulfill his duties, the Constitution does provide for appropriate Congressional responses. Congress can act by impeaching the President, holding oversight hearings, and cutting off appropriations.

However, 226 years of almost unbroken constitutional practice suggests the intended application of Article III’s plain text.<sup>76</sup> The federal courts do not have jurisdiction to hear “controversies” between Congress and the Executive, nor does Congress have power

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<sup>73</sup> 1958 CONST. art. 61 (Fr.).

<sup>74</sup> 521 U.S. 811, 830 (1997).

<sup>75</sup> 444 U.S. 996, 997–98 (1979) (Powell, J., concurring).

<sup>76</sup> See generally *Hayburn’s Case*, 2 U.S. 409 (1792).

to sue the President over his exercise of law-enforcement discretion. As legislative standing to sue is absent from Article III's enumerated categories, federal courts do not have the jurisdiction to hear the kind of cases that Justice Alito suggested regarding BLAG. For this reason, Justice Alito's concurrence is flatly contradicted by the plain text of Article III; an issue he fails to address in his opinion.<sup>77</sup>

It becomes even more difficult to understand Justice Alito's opinion regarding BLAG's standing in the context of his rejection of Massachusetts's standing in *Massachusetts v. Mellon* and *Massachusetts v. EPA*.<sup>78</sup> In *Mellon*, the Supreme Court considered a claim of federal jurisdiction between Massachusetts and the federal government, when Massachusetts claimed that Congress was spending money unconstitutionally.<sup>79</sup> The states, like the House of Representatives, are institutional, governing bodies, which, under German constitutional law, have standing to raise constitutional claims.<sup>80</sup> However, the Supreme Court in *Mellon* held that the states have no standing under the U.S. Constitution to bring suit.<sup>81</sup> Justice Alito agreed with this holding in *Massachusetts v. EPA*, when he joined the dissents authored by Chief Justice Roberts and Justice Scalia, both of which argued against state standing.<sup>82</sup> The claim for Massachusetts State standing is arguably analogous to BLAG's claim for standing to appeal, yet Justice Alito found standing for BLAG. This inconsistency makes Justice Alito's opinion in *Windsor* unclear.

## 2. CASES BETWEEN POLITICAL BRANCHES ARE NOT "LAW OR EQUITY" SUITS

Since, hypothetically, a suit by Congress against the President would revolve around federal law, it is likely that Justice Alito found standing for BLAG and the House of Representatives because he thought the case to be one "in law and equity." However, Article III

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<sup>77</sup> For more debate on whether a single house of Congress has standing to bring a federal case, see Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014).

<sup>78</sup> See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>79</sup> See 262 U.S. 447, 478–79 (1923).

<sup>80</sup> See GRUNDGESETZ [GG] [BASIC LAW], Article 93.

<sup>81</sup> See 262 U.S. at 480–89.

<sup>82</sup> See 549 U.S. at 535–49 (Roberts, C.J., dissenting); *Id.* at 549–560 (Scalia, J., dissenting).

unequivocally states that “[c]ases affecting [a]mbassadors, other public [m]inisters and [c]onsuls . . .” and “[c]ases of admiralty and maritime [j]urisdiction . . .” are not “cases in law and equity,” even though they may arise under federal law.<sup>83</sup>

The historical reasoning for this jurisdictional distinction is rooted in the British court system. In our opinion, based on Professor Calabresi’s knowledge of English legal history in 1787, admiralty cases in Great Britain were heard by special admiralty courts without jury trials; “cases in law” were heard by the Court of King’s Bench, the Court of Common Pleas, and the Court of Exchequer; and “cases in equity” were heard by the Court of Chancery and the Court of Exchequer.<sup>84</sup> Neither the Law Courts nor the Court of Chancery had jurisdiction to hear lawsuits brought by a House of Parliament against the King for the King’s failure to faithfully execute Parliament’s acts.<sup>85</sup> It thus makes sense that, in his opinion, Justice Alito did not point to an instance from 1789 to the present day in which the federal courts heard a case like the controversy he suggested between BLAG and Windsor. Such a case could never have been heard, either in England or in the United States.

There is one prior United States Supreme Court precedent, *INS v. Chadha*, in which the House of Representatives did have standing to challenge an executive branch failure to execute a law.<sup>86</sup> In *Chadha*, the INS gave Jagdish Rai Chadha a stay of an order of deportation, and the House of Representatives purported to veto the

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<sup>83</sup> U.S. CONST. art. III, § 2.

<sup>84</sup> See generally JOHN H. LANGBEIN, RENEE LETTOW LERNER, & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2009).

<sup>85</sup> In fact, neither the Law Courts nor the Court of Chancery had jurisdiction to hear cases of impeachment. The House of Commons had the sole power to initiate impeachments, and the House of Lords had the sole power to try them. The Law Courts and the Courts of Chancery and Exchequer could not review such cases, which helps explain why the U.S. Supreme Court was right in *United States v. Nixon* to rule that impeachment cases in the United States raise a political question, which the federal courts do not have jurisdiction to resolve, even though they arise under federal law. See generally 418 U.S. 683 (1974). Thus, Article III of the Constitution does not give federal courts jurisdiction to hear cases of impeachment that arise under federal law, and Article I gives the “sole” power to initiate such cases to the House of Representatives and the “sole” power to try them to the Senate. See U.S. CONST. art. I, §§ 2–3.

<sup>86</sup> 462 U.S. 919, 935–36 (1983).

stay of deportation pursuant to a statute that provided for a one-chamber legislative veto.<sup>87</sup> The Court found that it had jurisdiction to hear this case and held on the merits that all legislative vetoes are unconstitutional.<sup>88</sup>

The *Chadha* case is easily distinguishable from *Windsor*. In *Chadha*, each chamber of Congress had a statutory right to veto executive branch actions, and the executive branch disagreed, arguing that legislative vetoes were unconstitutional.<sup>89</sup> Each chamber of Congress thus suffered a legal injury in *Chadha* through the deprivation of a legal right explicitly conferred upon Congress by federal statutory law.<sup>90</sup> In contrast, the two chambers of Congress in *Windsor* did not have a statutory legal right to sue in federal court when the President declined to execute a law that he thought was unconstitutional. The House of Representatives can impeach a President who it thinks is not faithfully executing the law, but it cannot sue him seeking an injunction from a court anymore than the State of Massachusetts can sue the federal government over an unconstitutional spending bill or over the EPA's exercise of its law-enforcement discretion.

### 3. THE PRESIDENTIAL DUTY

Article II, Section III, of the U.S. Constitution obligates the President to "take [c]are that the [l]aws be faithfully executed . . . ."<sup>91</sup> Then, Article VI says that "[t]his Constitution, and the [l]aws of the United States which shall be made in pursuance [t]hereof . . . shall be the supreme [l]aw of the [l]and; and the [j]udges in every [s]tate shall be bound thereby, any [t]hing in the Constitution or [l]aws of any State to the [c]ontrary notwithstanding."<sup>92</sup>

Thus, the term "laws" in Article II encompasses the federal statutes and the U.S. Constitution, and the President has both the right

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<sup>87</sup> See *id.* at 923–28.

<sup>88</sup> See *id.* at 929–44.

<sup>89</sup> See *id.* at 925, 957–58.

<sup>90</sup> See *id.* at 951–59.

<sup>91</sup> U.S. CONST. art. II, § 3.

<sup>92</sup> U.S. CONST. art. VI.

and the duty to enforce the Constitution in accordance with his interpretation.<sup>93</sup> Therefore, President Obama fulfilled his duty by finding § 3 of DOMA unconstitutional in *Windsor*, and he stayed faithful to his understanding of the Constitution by refusing to defend DOMA in court.<sup>94</sup>

The President is an independent interpreter of the Constitution and must read the Constitution without regard to the contrary views of Congress or the U.S. Supreme Court. As President Andrew Jackson said in vetoing the Bank of the United States on constitutional grounds in 1832, notwithstanding the U.S. Supreme Court's decision in *McCulloch v. Maryland*<sup>95</sup>:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the

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<sup>93</sup> See generally *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of *assigned constitutional duties* each branch of the Government must *initially interpret* the Constitution, and the interpretation of its powers by any branch is due great respect from the others.” (emphasis added)); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988) (discussing the President's obligation to comply with the courts' judgments but not with the courts' interpretation of the law, evidenced by precedent); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1219 n.4 (2015) (Thomas, J., concurring in judgment) (“[E]xecutive officials necessarily interpret the laws they enforce . . .”).

<sup>94</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2684–85 (2013).

<sup>95</sup> 17 U.S. 316 (1819).

judges, and on that point the President is independent of both.<sup>96</sup>

Hence, the enumerated power in Article II, Section III, imposes a duty on the President to execute laws that he or she believes to be constitutional, not laws that Congress believes to be constitutional.

#### 4. WHY *COLEMAN V. MILLER* IS UNRELIABLE

Justice Alito relied on one final case to support his argument that BLAG had standing to appeal in *Windsor*: *Coleman v. Miller*, which was decided in 1939.<sup>97</sup> In *Coleman*, Chief Justice Hughes, writing for himself, Justice Stone, and Justice Reed, concluded that a majority of the Kansas State Senate had standing in federal court to litigate the constitutionality of Kansas's ratification of an amendment to the federal constitution.<sup>98</sup> The two dissenters, Justice Butler joined by Justice McReynolds, also agreed that there was standing.<sup>99</sup> However, Justices Frankfurter, Black, Roberts, and Douglas wrote separately in an opinion by Justice Frankfurter asserting that the Kansas State senators did not have standing to sue in this case.<sup>100</sup> These same four Justices also joined an opinion by Justice Black saying that this case raised a non-justiciable political question.<sup>101</sup>

To be blunt, a 5–4 standing holding from 1939 that was dependent on the votes of four pre-New Deal Supreme Court Justices is a dubious source of legal authority at best, especially in the face of the contrary opinion by Justices Frankfurter, Roberts, Black, and Douglas. The standing holding of *Coleman* is not well-reasoned and has barely been followed.<sup>102</sup> As a general matter, neither state nor federal majorities of legislative houses have brought lawsuits in the federal courts. Article III simply does not create federal jurisdiction over these kinds of controversies.

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<sup>96</sup> PAULSEN ET AL., *supra* note 52, at 68 (quoting at length President Jackson's message vetoing the bill that would have renewed the Bank of the United States).

<sup>97</sup> See *Windsor*, 133 S. Ct. at 2713 (Alito, J., dissenting); see also *Coleman v. Miller*, 307 U.S. 433 (1939).

<sup>98</sup> See *Coleman*, 307 U.S. at 456.

<sup>99</sup> See *id.* at 470–74.

<sup>100</sup> See *id.* at 460–70.

<sup>101</sup> See *id.* at 457–60.

<sup>102</sup> See generally Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 HARV. L. REV. 1741, 1744 (1999).



## 5. CONCLUSION ON BLAG'S LACK OF STANDING

Given the text of Article III and the last 226 years of practice, we think Justice Alito's argument for BLAG's standing is poorly reasoned and unpersuasive. If followed, it would revolutionize our form of government by inserting the federal courts into the middle of political disputes between the President and the two houses of Congress over how to best execute the laws. This is not a road the U.S. Supreme Court ought to follow.

### E. Prudential Standing Principles

The final argument for standing in *Windsor* is Justice Kennedy's claim that prudential standing principles suggest federal jurisdiction be exercised here.<sup>103</sup> This argument also fails. The prudential limits on standing in the federal courts are judicially created doctrines—which can be overridden by Congress—that generally bar third-party standing and the litigation of both generalized grievances that are shared by all citizens and statutory matters that are not within the zone of interest of a statute.<sup>104</sup> Congress cannot override the core Article III standing requirements, which are implicit in the case or controversy requirement, and the federal courts have no power to waive standing rules for prudential reasons merely because the Justices want to hear a particular case.

### F. Considering "Legal Injury"

The Court has said that Article III allows a litigant to have standing to sue in federal court only when a party has suffered a "legal injury" that is: 1) "concrete and particularized"; 2) "actual and imminent, not conjectural or hypothetical"; 3) "fairly traceable to the challenged action of the defendant"; and 4) likely to be prevented or redressed by a favorable judicial decision.<sup>105</sup> As discussed above, Windsor suffered such a legal injury when she was denied a spousal exemption from the inheritance tax.<sup>106</sup> The United States, however, did not suffer a legal injury when the district court agreed with the

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<sup>103</sup> See *Windsor*, 133 S. Ct. at 2685–86.

<sup>104</sup> See Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1243 n.4, 1266 (2011).

<sup>105</sup> See *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citation omitted).

<sup>106</sup> See *Windsor*, 133 S. Ct. at 2685–86.

Obama Administration and ruled that § 3 of DOMA was unconstitutional.

In our opinion, a party cannot be legally injured by a court ruling that he or she supports, even if complying with that decision imposes financial costs on the party. Similarly, a party cannot appeal from a decision that he or she supports with the hopes of losing in a larger jurisdiction.<sup>107</sup> Consider, for example, the case of a taxpayer who agrees with the federal government that he owes the IRS \$35,000 in income taxes. Such a taxpayer does not have standing to sue the government, even though compliance with the tax code will cost him \$35,000. A taxpayer does not suffer a “legal injury” when he is assessed for taxes that he agrees he owes, and there is an important distinction between actions that may “harm” or “burden” an individual and actions that do cause “legal injury.”

The United States did not suffer a “legal injury” when the district court ruled that the United States owed Windsor a \$363,053 tax refund precisely because the Obama Administration agreed with the Court’s determination. Absent a legal injury, the United States did not have standing to appeal to the Second Circuit or to the United States Supreme Court. The United States’ failure to pay Windsor only meant that Windsor had standing to request the issuance of a writ of mandamus, ordering that she finally be paid the refund.

## II. THE THIRD-PARTY APPELLANTS IN *HOLLINGSWORTH* LACKED FEDERAL STANDING

### A. *Hollingsworth* Procedural History

The lawsuit in *Hollingsworth v. Perry*<sup>108</sup> originated after the California Supreme Court held, in 2008, that a California ban on same-sex marriage violated the Equal Protection Clause of the California

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<sup>107</sup> See *Deposit Guar. Nat’l Bank of Jackson v. Roper*, 445 U.S. 326, 333–34 (1980) (“Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.” However, “[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.”).

<sup>108</sup> 133 S. Ct. 2652 (2013).

Constitution.<sup>109</sup> In the wake of the ruling, a number of same-sex couples were legally married in California; however, later that year, California voters passed Proposition 8, a statewide initiative that amended the California State Constitution to again ban same-sex marriage.<sup>110</sup> In response to the ban, two same-sex couples, Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo, brought this lawsuit in federal district court after being prohibited to marry by California state officials.<sup>111</sup>

Though the California Governor and State Attorney General refused to defend the constitutionality of Proposition 8 in court, the district court permitted the official proponents of the initiative, which included State Senator Dennis Hollingsworth, to do so as intervenors.<sup>112</sup> Ultimately, the district court held Proposition 8 to be unconstitutional, and the Governor and Attorney General of California declined to appeal.<sup>113</sup> Nonetheless, Hollingsworth and a bevy of private busybodies did purport<sup>114</sup> to appeal to the Ninth Circuit to defend the constitutionality of the proposition.<sup>115</sup>

The Ninth Circuit doubted whether Hollingsworth had standing to appeal the district court ruling and, thus, certified the following question to the California State Supreme Court:

Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its

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<sup>109</sup> See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>110</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927–28 (N.D. Cal. 2010).

<sup>111</sup> *Id.* at 927.

<sup>112</sup> *Id.* at 928.

<sup>113</sup> See *id.* at 1003.

<sup>114</sup> In *Arizonans for Official English v. Arizona*, the Justices raised doubts that initiative proponents “have a quasi-legislative interest in defending the constitutionality of the measure they successfully sponsored.” 520 U.S. 43, 65 (1997).

<sup>115</sup> See *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011).

adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.<sup>116</sup>

The California Supreme Court ruled that Hollingsworth did have standing to appeal the district court's order, and the Ninth Circuit accepted that conclusion and ruled in favor of Perry's same-sex marriage claim.<sup>117</sup> Hollingsworth then appealed the Ninth Circuit ruling to the U.S. Supreme Court, which granted certiorari.<sup>118</sup>

### B. *Hollingsworth's Lack of Standing*

Reflecting on the Court's definition of "legal injury" discussed in Part II, it is quite clear that Hollingsworth, as a third party to the litigation, did not suffer such a legal injury. This poses the question of whether a third party may sue in federal court seeking enforcement of a federal statute, to which we answer no. In this Part, we argue that the U.S. Supreme Court was correct in overruling the California Supreme Court's finding of standing. Third parties are not empowered to seek enforcement of federal law, and thus, Hollingsworth did not have standing to sue in federal court.

#### 1. LAW ENFORCEMENT IS THE EXCLUSIVE RIGHT OF THE EXECUTIVE

The power to enforce criminal law is exclusive to the Executive branch, as federal and state prosecutors are a part of their respective executive branches.<sup>119</sup> For example, it is an axiom of standing law that crime victims do not have standing to request a judicial order directing state or federal prosecutors to prosecute a particular individual.<sup>120</sup> In the seminal case of *United States v. Cox*,<sup>121</sup> the Fifth Circuit held that a federal district judge could not jail the U.S. Attorney or Acting Attorney General of the United States, Nicholas deB. Katzenbach, simply because the attorneys refused to bring a

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<sup>116</sup> *Id.*

<sup>117</sup> *Perry v. Brown*, 671 F.3d 1052, 1064, 1070–72 (9th Cir. 2011).

<sup>118</sup> *See* *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013).

<sup>119</sup> *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93 (1789).

<sup>120</sup> Only a U.S. Attorney has standing to initiate a federal prosecution. *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965).

<sup>121</sup> 342 F.2d 167 (5th Cir. 1965).

federal prosecution against two African American civil rights workers whom the district judge wanted to see prosecuted.<sup>122</sup> The Fifth Circuit held that the Executive branch had judicially unreviewable discretion to refuse to bring criminal prosecution where it believed such action would be unjust;<sup>123</sup> this holding is also supported by Attorney General Roger B. Taney's *Opinion on the Jewels of the Princess of Orange*.<sup>124</sup> President Thomas Jefferson also supported this decision when he ordered that the prosecution of William Duane for violating the Sedition Act of 1798 be dropped on the grounds that the statute was unconstitutional.<sup>125</sup> President Jefferson defended his decision by writing the following:

The President is to have the laws executed. He may order an offense then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into a legal train. . . . There appears to be no weak part in any of these positions or inferences.<sup>126</sup>

It follows that no third party has standing to challenge a presidential or Justice Department decision to forego a prosecution. Before federal death-row prisoner Gary Gilmore was executed by a firing squad in 1977, his mother was denied standing when she attempted to argue that the execution was cruel and unusual under the Eighth Amendment.<sup>127</sup> The U.S. Supreme Court ruled that it was Gary Gilmore's exclusive right to bring the claim, that Gilmore waived that right by asking to be executed, and that his mother lacked standing to raise the claim on his behalf.<sup>128</sup> Only a federal

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<sup>122</sup> See *id.* at 171–72.

<sup>123</sup> See *id.*

<sup>124</sup> See 2 Op. Att'y Gen. 482 (1831), 1831 WL 995; see also PAULSEN ET AL., *supra* note 52, at 319–21.

<sup>125</sup> See PHILLIP I. BLUMBERG, *REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW* 116–22 (2010).

<sup>126</sup> PAULSEN ET AL., *supra* note 52, at 318.

<sup>127</sup> See *Gilmore v. Utah*, 429 U.S. 1012, 1014–15 (1976) (Burger, C.J., concurring); see also *id.* at 1017 (Stevens, J., concurring).

<sup>128</sup> See *id.* at 1014–15 (Burger, C.J., concurring).

defendant who is prosecuted has standing to raise constitutional arguments in his or her defense; this rule also pertains to state criminal prosecutions.<sup>129</sup>

Third parties also lack standing to sue for the enforcement of other federal or state laws when the government denies their enforcement. This point is illustrated by the response to President Obama's recent executive action. On June 15, 2012, the President ordered that the removal provisions of the Immigration and Nationality Act (INA) not be enforced against an estimated population of between 800,000 and 1.4 million individuals who were illegally present in the United States.<sup>130</sup> This unilateral exercise of presidential prosecutorial discretion had the effect of writing into federal law the so-called "DREAM Act,"<sup>131</sup> a bill consistently blocked by Congress since 2001. Notwithstanding the dramatic scope of the President's action, the deportation advocates do not have standing to challenge the President's action in federal court. Although private litigants may be dismayed by presidential exercises of law enforcement discretion, such parties are not "legally injured" by the executive action and, therefore, have no legal right to sue over the Executive's exercise of prosecutorial discretion.

These same principles apply to State Senator Hollingsworth's attempt to appeal the district court's holding that California's Proposition 8 was unconstitutional when neither the Governor nor the Attorney General of California agreed to enforce the law.<sup>132</sup> Article V, Section 1 of the California Constitution provides as follows: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."<sup>133</sup> Article V, Section 13 follows with the powers of the Attorney General of California:

Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the

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<sup>129</sup> See generally *id.* at 1014–17 (Burger, C.J., concurring).

<sup>130</sup> Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012, [http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?\\_r=0](http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?_r=0).

<sup>131</sup> See DREAM Act of 2010, S. 3992, 111th Cong. (2010).

<sup>132</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661–63 (2013).

<sup>133</sup> CAL. CONST. art. V, § 1.

State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.<sup>134</sup>

It is unquestionable whether the Governor and Attorney General of California have the exclusive right to execute—or to direct the execution of—all laws, criminal and civil, in the State of California. Indeed, the Governor has the explicit power and duty to make sure “that the law is faithfully executed,” and no third parties can legally assume this role.

## 2. HOLLINGSWORTH DID NOT SUFFER A LEGAL INJURY

The “legal injury” claimed by Hollingsworth is not the sort of traditional legal injury for which litigants in federal court have ever been entitled to sue in American history. Hollingsworth alleged to have suffered an injury when same-sex couples were granted marriage licenses in California in defiance of Proposition 8; however, the federal courts do not generally allow people to sue when they

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<sup>134</sup> *Id.* § 13.

are disgruntled by another's matrimony.<sup>135</sup> If our child or close friend chooses to marry someone of whom we disapprove, we may be very upset, but this discontent does not amount to "a legal injury" over which we can sue in federal court. Not a single reported case grants an individual standing to sue for having morally disapproved of the marriage of another couple. A litigant would not be deemed to have suffered a legal injury in this setting, unless there was bigamy or incest involved, and even then, a court proceeding would almost certainly take place through a criminal trial in which the State Attorney General and Governor would participate. Otherwise, a private suit challenging a specific couple's marriage would be dismissed because the plaintiff had not suffered a legally cognizable injury.

Hollingsworth might have claimed another injury—that their state constitutional right to amend the state's constitution through the initiative process was denied when the Governor and Attorney General of California refused to defend Proposition 8. This claim, too, would fail. Article II, Section 8 of the California State Constitution sets out most of the provisions that govern a citizen's right to legislate by initiative.<sup>136</sup> It provides as follows:

(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all

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<sup>135</sup> See, e.g., *Hollingsworth*, 133 S. Ct. at 2664 ("For the reasons we have explained, petitioners have likewise not suffered an injury in fact, and therefore would ordinarily have no standing to assert the State's interests."); *id.* at 2668 ("We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.").

<sup>136</sup> See generally CAL. CONST. art. II, § 8.



candidates for Governor at the last gubernatorial election.

(c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

(d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.

(e) An initiative measure may not include or exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of that political subdivision.

(f) An initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure.<sup>137</sup>

Nowhere does this section suggest that the proponents of an initiative in California have the legal right to defend its constitutionality in federal court when the Governor and Attorney General of the State decline to do so.

Despite this, the California Supreme Court did hold in *Perry v. Brown*<sup>138</sup> that the proponents of Proposition 8 had standing “under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”<sup>139</sup> The Supreme Court of

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<sup>137</sup> *Id.*

<sup>138</sup> 265 P.3d 1002 (Cal. 2011).

<sup>139</sup> *Id.* at 1007.

California based its decision on the California Elections Code and Article II, Section 8, of the California Constitution.<sup>140</sup> However, the plain language of Article II, Section 8 in no way supports the California Supreme Court's holding. The federal Constitution does not provide for state initiatives and referenda, nor does it give the proponents of such measures standing to defend them in federal court. To the extent that the Constitution does address the constitutional questions that are raised by initiatives and referenda, it does so in Article IV, Section 4, which states: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."<sup>141</sup>

In *Pacific States Telephone & Telegraph Co. v. Oregon*,<sup>142</sup> the U.S. Supreme Court reached the dubious conclusion that the constitutionality of direct democracy via initiatives and referenda raised a political question insofar as it was inconsistent with the Constitution's guarantee of a republican form of government.<sup>143</sup> However, the holding in *Pacific States Telephone & Telegraph Co.* did not justify standing for Hollingsworth to file suit in federal court. The right of California citizens to legislate through initiatives and referenda, as stipulated by the California Constitution, does not include an express right of action for privately interested parties to defend the constitutionality of such initiatives and referenda when the Governor and Attorney General so decline.<sup>144</sup> The California Supreme Court may be willing to engage in such free-style constitution rewriting, but there is no reason why the federal courts, being tribunals of limited jurisdiction, should defer to the California Supreme Court on this issue. Imagine for a moment what would likely proceed if Hollingsworth were to prevail in the instant case. County clerk registrars would be advised by the Governor and State Attorney General to defy the holding, and the federal court ruling would exist *in*

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<sup>140</sup> See *id.* at 1006–07.

<sup>141</sup> U.S. CONST. art. IV, § 4.

<sup>142</sup> 223 U.S. 118 (1912).

<sup>143</sup> See *id.* at 149–51. Although this question is now settled as accepted precedent, Steven Calabresi thinks this decision was arguably wrong as an initial matter and that Article IV, Section 4 originally forbade direct democracy in the states.

<sup>144</sup> See generally CAL. CONST. art. II, § 8.

*vacuo*. Whether the injury claimed by Hollingsworth could be redressed by judicial order was thus entirely speculative, and federal jurisdiction is not permissible under these circumstances, as was recognized long ago in *Hayburn's Case*.<sup>145</sup>

Nevertheless, the issue of whether a litigant has suffered an actual legal injury and merits standing in federal court is a question of federal law. State court rulings as to property, contract, or tort law may, in effect, expand the range of state legal injuries for which a litigant can sue in federal court; however, while the standing inquiry may be intertwined with state law, neither Congress nor the states can create standing to satisfy the curiosity of uninjured third parties.<sup>146</sup> In *Summers v. Earth Island Institute*,<sup>147</sup> Justice Scalia, writing for the Court, addressed the question of who has standing to sue in federal court:

In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”

The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that “the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction.” He bears the burden of showing that he has standing for each type of relief sought. To seek injunctive relief, a plaintiff must show that he is under threat of suffering “injury in fact” that is

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<sup>145</sup> See generally *Hayburn's Case*, 2 U.S. 409 (1792).

<sup>146</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662–63 (2013).

<sup>147</sup> 555 U.S. 488 (2009).

concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. This requirement assures that “there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party[.]” Where that need does not exist, allowing courts to oversee legislative or executive action “would significantly alter the allocation of power . . . away from a democratic form of government[.]”<sup>148</sup>

Simply put, Hollingsworth did not face an actual or imminent legal injury because of the way in which California administered its marriage laws, and permitting the Court to adjudicate a lawsuit in the absence of such injury would threaten the government’s balance of powers by granting increased oversight to the judiciary. Thus, Chief Justice Roberts and Justices Scalia, Ginsburg, Breyer, and Kagan correctly decided *Hollingsworth*.<sup>149</sup> Hollingsworth lacked standing to appeal the judgment of the district court.

### III. THE DOMESTIC RELATIONS EXCEPTION SHOULD BE ABOLISHED

#### A. *The Origins of Federal Question Jurisdiction*

The asserted basis for federal court jurisdiction in *Obergefell*, *Windsor* and *Hollingsworth* is that the lawsuits were brought under the first clause of Article III, Section 2, which, as we noted in the Introduction, asserts the following: “The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .”<sup>150</sup> In Section 25 of the Judiciary Act of 1789, Congress provided the U.S. Supreme Court with jurisdiction to hear appeals from state supreme courts where the validity

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<sup>148</sup> *Id.* at 492–93 (alteration in original) (citations omitted).

<sup>149</sup> *See Hollingsworth*, 133 S. Ct. 2652.

<sup>150</sup> U.S. CONST. art. III, § 2, cl. 1.

of a federal law or treaty was called into question by the state courts.<sup>151</sup> The lower federal courts were not, however, given this broad grant of federal question jurisdiction by Congress until 1875—well after the Civil War.<sup>152</sup> For more than eighty years, the lower federal courts were almost exclusively confined to hearing diversity suits and admiralty cases.<sup>153</sup>

On March 3, 1875, Congress granted the lower federal courts general federal question jurisdiction when it passed the Jurisdiction and Removal Act, which stated, in relevant part, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . .*<sup>154</sup>

The language of the grant of the federal question jurisdiction was directly modeled on the language of the Judiciary Act of 1789, which explicitly provided for federal court diversity jurisdiction over “all suits of a civil nature at common law or in equity . . . .”<sup>155</sup> As the U.S. Supreme Court explained in *Ankenbrandt v. Richards*,<sup>156</sup> which is the leading case on the domestic relations exception to the federal courts diversity jurisdiction:

The Judiciary Act of 1789 provided that “the circuit courts shall have original cognizance, concurrent with the courts of the several States, of *all suits of a*

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<sup>151</sup> Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (1789).

<sup>152</sup> See Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (1875).

<sup>153</sup> Judiciary Act §§ 9, 11.

<sup>154</sup> Jurisdiction and Removal Act § 1 (emphasis added).

<sup>155</sup> Judiciary Act § 11.

<sup>156</sup> 504 U.S. 689 (1992).

*civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.*" The defining phrase, "all suits of a civil nature at common law or in equity," remained a key element of statutory provisions demarcating the terms of diversity jurisdiction until 1948, when Congress amended the diversity jurisdiction provision to eliminate this phrase and replace in its stead the term "all civil actions."

. . . .

. . . We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity." As the . . . [Second Circuit has] observed, "More than a century has elapsed since the *Barber* dictum without any intimation of Congressional dissatisfaction. . . . Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant." Considerations of *stare decisis* have particular strength in this context, where "the legislative power is implicated, and Congress remains free to alter what we have done."

When Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had

construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters. With respect to the 1948 amendment, the Court has previously stated that “no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed.” With respect to such a longstanding and well-known construction of the diversity statute, and where Congress made substantive changes to the statute in other respects, we presume, absent any indication that Congress intended to alter this exception, that Congress “adopt[ed] that interpretation” when it reenacted the diversity statute.<sup>157</sup>

The Supreme Court thus concluded that the federal courts lacked jurisdiction under the diversity statute over the tort claim of child abuse because, in 1787, that statute gave courts jurisdiction to hear only “suits of a civil nature at common law or in equity,” which then meant lawsuits that could be heard by the Court of King’s Bench, the Court of Common Pleas, the Court of Exchequer, and the Court of Chancery in Great Britain.<sup>158</sup> As we noted earlier, suits regarding marriage, divorce, alimony, child support, and probate were heard by the Ecclesiastical Courts of the Church of England.<sup>159</sup> It was not until Parliament passed the Matrimonial Causes Acts of 1857 to 1878 that an ordinary court—the Court of Divorce and Matrimonial Causes—acquired jurisdiction over family law cases.<sup>160</sup> In 1875, the High Court was created to try all important English cases and was given a Queens Bench Division, Chancery Division, and Family Division.<sup>161</sup> The Family Division then acquired jurisdiction over all matrimonial causes.<sup>162</sup>

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<sup>157</sup> *Id.* at 698–701 (emphasis in original) (citations omitted).

<sup>158</sup> *Barber v. Barber*, 62 U.S. 582 (1858).

<sup>159</sup> *See id.* at 693, 699–700; *see also* A. T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 177–84 (Butterworth & Co.) (1902).

<sup>160</sup> Danaya C. Wright, *Untying the Knot: An Analysis of the English Divorce and Matrimonial Causes Court Records, 1858–1866*, 38 U. RICH. L. REV. 903, 903–04 (2004); *see also* CARTER, *supra* note 167, at 177–84.

<sup>161</sup> *See* CARTER, *supra* note 167, at 177–84.

<sup>162</sup> *Id.* at 177–80.

The important point for this article is that when the Judiciary Act of 1789 was written, the phrase “suits of a civil nature at common law or in equity” was not understood to encompass matrimonial causes because the English courts of law and equity did not have jurisdiction over matrimonial causes until at least 1857. It is for this reason that, in 1858, the U.S. Supreme Court explicitly held in *Barber v. Barber* that there was a domestic relations exception to the federal court’s diversity jurisdiction.<sup>163</sup> Domestic relations cases were understood as simply not “suits of a civil nature at common law or in equity” that could be brought before the Royal Courts of Justice at the Strand in 1789.<sup>164</sup> Indeed, Professor Meredith Johnson Harbach notes that “[f]ew of what are regarded as the foundational cases” of the domestic relations exception to federal court jurisdiction “arose in the context of diversity jurisdiction.”<sup>165</sup> Professor Harbach observes that, although *Barber* arose under the federal court’s diversity jurisdiction, four other important domestic relations cases came about differently.<sup>166</sup>

In *Ankenbrandt*, Justice White spoke for the Court and made two holdings regarding the jurisdictional grant. First, the 1948 reformulation of the diversity jurisdiction to replace the phrase “all suits of a civil nature at common law or in equity” with the phrase “all civil actions” was not meant to change the meaning of the jurisdictional

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<sup>163</sup> *Barber*, 62 U.S. at 589–94.

<sup>164</sup> See *Ankenbrandt v. Richards*, 504 U.S. 689, 698–701 (1992) (discussing *Barber*, 62 U.S. 582).

<sup>165</sup> Harbach, *supra* note 28, at 143 n.46 (“Few of what are regarded as the foundational cases arose in the context of diversity jurisdiction. Compare *Barber v. Barber*, 62 U.S. 582, 583–84 (1859) (noting that federal jurisdiction arose under diversity jurisdiction), with *Ohio ex rel. Popvici v. Agler*, 280 U.S. 379, 382 (1930) (coming before Court on writ of certiorari from Ohio Supreme Court, although federal law was at issue), *De La Rama v. De La Rama*, 201 U.S. 303, 308 (1906) (arising under federal courts’ statutory jurisdiction over territorial courts), *Simms v. Simms*, 175 U.S. 162, 168–69 (1899) (arising under federal courts’ statutory jurisdiction over the territorial courts), *Perrine v. Slack*, 164 U.S. 452, 453 (1896) (noting that jurisdiction arose pursuant to federal habeas corpus jurisdiction), and *In re Burrus*, 136 U.S. 586, 596–97 (1890) (noting that jurisdiction arose pursuant to federal habeas corpus jurisdiction).”).

<sup>166</sup> *Id.*



grant. Second, the change in term thus did not eliminate the domestic relations exception to the diversity jurisdiction.<sup>167</sup> *Ankenbrandt* remains very much the governing case law of the present day.

In 1948, the statutes governing federal court jurisdiction were revised.<sup>168</sup> The federal question statute now provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>169</sup> As with the 1948 revision of the grant of diversity jurisdiction, the federal courts have not read the 1948 revision of the federal question statute as a change or expansion in its coverage. The 1948 revision has been treated as if it were purely stylistic. In particular, the federal question grant of jurisdiction has been interpreted since 1948 to encompass the well-pleaded complaint rule of 1908.<sup>170</sup> Under this rule, statutory federal question jurisdiction cannot be based on a plaintiff’s anticipation that the defendant may raise a federal statute in his or her defense. Instead, a federal statute must be evident on the face of the plaintiff’s well-pleaded complaint, which must directly allege that the defendant violated the plaintiff’s federal rights under the U.S. Constitution, treaties, or federal laws.<sup>171</sup>

#### B. *The Domestic Relations Exception in Modern Day*

In *Ankenbrandt v. Richards*, the U.S. Supreme Court stated that the 1948 revision was purely stylistic and in no way substantive,<sup>172</sup> and the survival of the well-pleaded complaint rule after the 1948 revision underscores this point. As Judge Richard Posner explained

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<sup>167</sup> *Id.*

<sup>168</sup> *See id.* at 164 n.128 (quoting *Ankenbrandt*, 504 U.S. at 700).

<sup>169</sup> *Id.* at 165 n.132 (quoting 28 U.S.C. § 1331 (2000)).

<sup>170</sup> *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

<sup>171</sup> *Id.* Scholars agree that Article III allows the federal courts to hear any case in which there is a federal ingredient, even if the federal question does not appear in the plaintiff’s complaint. *See Harbach, supra* note 28, at 186, 186 n.253; *see also Stein, supra* note 178, at 688–90. However, the federal question statute is read more narrowly and confers federal question jurisdiction only when a “suit arises under the law that creates the cause of action.” *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). State lawsuits that are likely to lead to a federal law defense are not federal questions under 28 U.S.C. § 1331, even though they are federal questions for the purposes of Article III. *See Mottley*, 211 U.S. at 152–54.

<sup>172</sup> 504 U.S. 689, 700 (1992).

in 2006, the statutory limits on federal question and diversity jurisdiction survived the revision unscathed:

There is no good reason to strain to give a different meaning to the identical language in the diversity and federal-question statutes. The best contemporary reasons for keeping federal courts out of the business of probating wills, resolving will contests, granting divorces and annulments, administering decedents' estates, approving child adoptions, and the like . . . are as persuasive when a suit is filed in federal court on the basis of federal law as when it is based on state law.<sup>173</sup>

In 2004, the U.S. Supreme Court explained in *Elk Grove Unified School District v. Newdow* that, "while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts."<sup>174</sup> Thus, the Court in *Newdow* held:

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights . . . . When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.<sup>175</sup>

Many commentators, including Mary Anne Case, Cass Sunstein, and Dale Carpenter, read the *Newdow* language as suggesting that the U.S. Supreme Court did not want to decide a Fourteenth Amendment same-sex marriage claim at the time.<sup>176</sup> Professor Harbach writes:

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<sup>173</sup> Jones v. Brennan, 465 F.3d 304, 307 (7th Cir. 2006).

<sup>174</sup> 542 U.S. 1, 13 (2004) (citation omitted).

<sup>175</sup> *Id.* at 17.

<sup>176</sup> See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1791–92 (2005); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2113–14 (2005); Dale Carpenter, *Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept*, 2 U. ST. THOMAS L.J. 71, 83–84, 84 n.58 (2004). Commentators who have examined the historical underpinnings of the domestic relations exception include: Kristin A. Collins,

A number of courts continue to apply the [domestic relations] exception to federal questions, without reference to *Newdow*. . . .

Some courts have explicitly advocated extension of the domestic relations exception to federal questions. Other courts have limited the domestic relations exception to diversity jurisdiction. And still others have noted that it is unsettled whether the exception applies to federal questions.

Perhaps surprisingly, *Newdow* itself has had considerable traction in the lower federal courts. A number of courts have relied on *Newdow* to apply the exception to federal questions.<sup>177</sup>

The problem thus arises: were *Obergefell*, *Windsor* and *Perry*'s lawsuits challenging the constitutionality of state same-sex marriage bans and DOMA "suits of a civil nature at common law or in equity," as that language was used in the 1875 Jurisdiction and Removal Act? After much deliberation, we believe yes, they were.

Though the federal courts did not originally have the statutory federal question jurisdiction to hear cases challenging the definition of marriage, divorce, alimony, child custody, or probate, family law issues were sometimes raised in contexts where they were dispositive of a case at common law or in equity. In *Reynolds v. United States*,<sup>178</sup> George Reynolds, a leader of the Mormon Church, was criminally prosecuted by the United States for the crime of bigamy, which he committed in the Utah territory.<sup>179</sup> Bigamy violates federal law adopted under Article IV, Section 3, of the Constitution, which gives Congress the power to pass all needful rules and regulations for the governance of federal territories.<sup>180</sup> The U.S. Supreme Court

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*Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005); and Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004).

<sup>177</sup> Harbach, *supra* note 28, at 158–60 (footnotes omitted).

<sup>178</sup> 98 U.S. 145 (1878).

<sup>179</sup> *See id.* at 146.

<sup>180</sup> *See id.* at 152–53, 166–68.

correctly asserted federal jurisdiction over this case because the lawsuit involved a federal crime committed in a federal territory under a federal law, which arguably violated the Free Exercise of Religion Clause of the First Amendment.<sup>181</sup> The federal anti-bigamy law, section 5352 of the Revised Statutes, provided as follows:

Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years.<sup>182</sup>

As we discussed earlier, criminal cases have always been considered cases in law and equity with federal question jurisdiction, so Reynolds's criminal prosecution clearly arose under federal law. However, it is also true that the case against Reynolds rested on a federal definition of marriage. Though the case itself did not seek a redefinition of marriage to accommodate bigamy, Reynolds did pursue a constitutional free-exercise-of-religion exemption from the law against bigamy.<sup>183</sup> As demonstrated by *Reynolds*, when the United States brings a criminal case against a defendant whose defense rests on a federal constitutional right, the case qualifies as one in law or equity as those words were understood in 1787.

Criminal cases involving the family were no more covered by the domestic relations exception than were tort cases involving the family. The U.S. Supreme Court expressly held in *Ankenbrandt v. Richards*<sup>184</sup> that a tort suit brought by a divorced wife alleging the sexual abuse of her children by her former husband and his girlfriend could go forward in federal court, notwithstanding the domestic relations exception.<sup>185</sup> Following the reasoning of *Ankenbrandt*, the federal courts had jurisdiction not only to review the constitutionality of Reynolds's criminal prosecution, but also to judicially review

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<sup>181</sup> See *id.* at 154.

<sup>182</sup> *Id.* at 146.

<sup>183</sup> See *id.* at 161–65.

<sup>184</sup> 504 U.S. 689 (1992).

<sup>185</sup> See *id.* at 706–07.

the prosecution of the Lovings in *Loving v. Virginia*.<sup>186</sup> In *Loving*, a white man married an African-American woman in violation of Virginia's criminal statute that forbade interracial marriage and miscegenation.<sup>187</sup> The Lovings pled guilty to the criminal charge and were sentenced to one year in prison, but the sentence was suspended for twenty-five years so long as they left the State of Virginia, which they did.<sup>188</sup> The couple eventually challenged the constitutionality of their criminal prosecution before the U.S. Supreme Court, and like in *Reynolds*, the Court ruled that it had federal jurisdiction to decide the case, noting that the suit was not *purely* matrimonial, but rather one of a criminal nature.<sup>189</sup>

In contrast, the litigation in *Hollingsworth* was brought by two same-sex couples who *purely* sought the right to marry and to marital status under the civil law without respect to any religious teachings as to who can marry whom.<sup>190</sup> While the Governor and Attorney General of California agreed with the same-sex litigants that Proposition 8 was unconstitutional, California did allow for domestic partnerships, which provided same-sex couples all the tangible benefits of a heterosexual marriage.<sup>191</sup> The legal injury suffered by the plaintiffs in *Hollingsworth* was, thus, not economic; instead, it was rooted in their legal status as a couple being recognized by the State of California as "a civil union" and not as "a marriage." This is today a legal cognizable injury for which one can bring a federal lawsuit, but that was not always the case as a matter of legal history.

The Court of King's Bench, the Court of Common Pleas, the Court of Exchequer, and the Court of Chancery would not have had jurisdiction in 1787 to hear a case that only challenged the legal definition of marriage, lacking a criminal or civil penalty component. Perry's case was a *pure* family law case, which did not arise under the "common law or in equity" as these terms were understood in 1787 or 1875. The only English courts that would have had jurisdiction to hear *Hollingsworth* would have been the Ecclesiastical Courts, which continued to hear all English family law cases until

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<sup>186</sup> 388 U.S. 1 (1967).

<sup>187</sup> *See id.* at 2–3.

<sup>188</sup> *See id.* at 3.

<sup>189</sup> *See id.* at 7–12.

<sup>190</sup> *See* discussion *supra* Section III.B.2.

<sup>191</sup> *See* *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

the middle of the nineteenth century. Therefore, although Perry's family-law case arises under federal law, specifically the Fourteenth Amendment, we do not believe the lawsuit met the criteria of "equity" as per the original understanding of the federal question statute.

The litigation in *Windsor* differed from that of *Hollingsworth* in that Edith Windsor's claims involved a tort or civil penalty. We find that the federal district court did have jurisdiction over Edith Windsor's lawsuit against the United States challenging DOMA, insofar as it subjected her to a \$363,053 cost that she would not have owed had she married a man instead of a woman. A suit for money damages against the government, where there has been a waiver of sovereign immunity, is clearly a "suit of a civil nature at common law or in equity" and thereby presents a federal question for the purposes of 28 U.S.C. § 1331. The English courts of law and equity did frequently hear suits for money damages in 1787, and thus there is nothing untoward in the district court's decision to hear Windsor's case as an initial matter, even though the government lacked standing to subsequently appeal the case.

C. *Why the Court Should Expand "Equity" to Include Same-Sex Marriage Cases*

Nonetheless, we should be careful about considering the original understanding of equity jurisdiction with such inflexibility as in the above analysis, for it is indisputable that equity jurisdiction first arose in England to correct injustices occurring from an overly stringent and technical application of the law. As the seventeenth-century jurist John Selden famously said:

Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot; what an uncertain measure would this be? One chancellor has a long foot, another a

short foot, a third an indifferent foot: 'tis the same thing in the chancellor's conscience.<sup>192</sup>

Equity jurisdiction is, by its nature, malleable and inherently protean, and it exists to correct rank injustices that might occur as a result of a technical and rigid application of the law. One can no more confine equity to its causes of action in 1787 than one could confine the Necessary and Proper Clause<sup>193</sup> to only those powers that were “necessary and proper” for executing the enumerated powers in 1787. In 1787, it was not necessary and proper for the federal government to have an air force, but it is in 2016.<sup>194</sup> As the great jurist Robert Bork wrote, “The world changes in which unchanging values find their application.”<sup>195</sup>

The grant of equity jurisdiction by both the Federal Question Act of 1875 and the Federal Question Clause in Article III allows for a judicial power whereby the federal courts may, as a matter of conscience, intervene to correct an injustice at law in situations where changes in the facts give an old principle a new application. Though federal courts ought not take advantage of this power to expand their equity jurisdiction capriciously, it is appropriate for the federal courts to intervene when the nation is closely divided on a fundamental claim of constitutional right as to the legality of bans on same-sex marriage. As Abraham Lincoln said:

“A house divided against itself cannot stand.” I believe this government cannot endure, permanently half *slave* and half *free*. I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided. It will become *all* one thing, or *all* the other. Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike

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<sup>192</sup> JOHN SELDEN, THE TABLE-TALK OF JOHN SELDEN: WITH NOTES BY DAVID IRVING 62–63 (Edinburgh: Thomas Constable & Co. 1854).

<sup>193</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>194</sup> See generally *Ollman v. Evanss and Novak*, 750 F.2d 970 (1984).

<sup>195</sup> *Id.* at 995.

lawful in all the States, old as well as new—North as well as South.<sup>196</sup>

The same principle applies to same-sex marriage and, for that matter, the legal recognition of polygamous marriage. Over 100 years ago, Congress recognized that the Union could not tolerate the addition of even one polygamous state. Hence, Utah was forced to ban polygamy as a condition for admission to statehood.<sup>197</sup> Similarly, there are inevitable injustices that surface from the sanctioning of same-sex marriage in some states but not in others, and these wrongs should bother the conscience of the Court.

It is to correct injustices that we gave the federal courts equitable jurisdiction, and the courts were right to use that jurisdiction to decide on the merits regarding the constitutionality of same-sex marriage bans, even though equity would not have gone so far in 1787 or in 1875.<sup>198</sup> Our confidence in this conclusion is strengthened by the fact that the U.S. Supreme Court has exercised federal jurisdiction in two very important family law cases within the last twenty-five years: *Michael H. v. Gerald D.*<sup>199</sup> and *Troxel v. Granville*.<sup>200</sup> While both lawsuits were pure family law cases—the former involving visitation rights by adulterous fathers, and the latter involving visitation rights by grandparents—none of the Justices or litigants doubted the question of federal jurisdiction over the suits. The U.S. Supreme Court heard and resolved both cases without any Justice suggesting an absence of federal jurisdiction, and there was no adverse response from Congress with respect to the U.S. Supreme Court's assertion of jurisdiction over either case.<sup>201</sup> The Court's decision in *Obergefell* further confirms our position: the domestic relations exception to federal jurisdiction is archaic, inequitable, and

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<sup>196</sup> See ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 99–100 (2010) (emphasis in original) (citing *THE COLLECTED WORKS OF ABRAHAM LINCOLN* (Roy P. Basler ed., Rutgers University Press 1953)).

<sup>197</sup> See Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894).

<sup>198</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>199</sup> 491 U.S. 110 (1989).

<sup>200</sup> 530 U.S. 57 (2000).

<sup>201</sup> We thank Bradley Silverman for calling these two family law cases to our attention in the context of the jurisdiction issues that surround the constitutional debate over same-sex marriage cases.



ought to be overruled.<sup>202</sup> Hopefully, the U.S. Supreme Court will agree when it hears its next same-sex marriage case.

There remains one final wrinkle in our argument not yet addressed. Under 28 U.S.C. § 1257, the U.S. Supreme Court has federal question jurisdiction to review final judgments rendered by the highest court of a state when a decision could be had in which the validity of a state statute is called into question on the ground of its being repugnant to the Constitution, laws, or treaties of the United States.<sup>203</sup> This provision descends from Section 25 of the Judiciary Act of 1789, referred to above, and raises the question of whether a state Supreme Court ruling on whether a state marriage statute violated the Fourteenth Amendment in a non-criminal case where no financial consequences were at stake could be heard by the U.S. Supreme Court as a case in law or equity arising under the Constitution. The answer is yes, because the U.S. Supreme Court ought to recognize a new equitable cause of action allowing domestic relations cases to be heard in federal court.

#### CONCLUSION

In sum, we believe that the Supreme Court lacked jurisdiction to hear appeals in *Windsor* and *Hollingsworth* for appellants' failure to establish proper standing, and that pure same-sex marriage cases are indeed cases in equity for the purposes of federal jurisdiction. We agree with the Court's conclusion in *Windsor* that DOMA was unconstitutional, and we applaud the ruling in *Obergefell*—there is a right to same-sex marriage under the Fourteenth Amendment, enforceable in federal court. We therefore agree with the *Obergefell* decision.

It is the nature of equity jurisdiction to evolve over time in order to correct rigidities in the common law, and in a constitutional democracy like ours, new equitable causes of action may sometimes be created by Congress, and other times, by the U.S. Supreme Court. The word “equity” in Article III has a historical gloss that allows for its extension over domestic relations cases. That exception reflects archaic, gender-discriminatory laws like coverture laws and laws

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<sup>202</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>203</sup> See 28 U.S.C. § 1257 (2012).

that did not allow women to sue for spousal rape. In light of the nation's core commitment in the Nineteenth Amendment to the idea that sex discrimination as to political rights is unconstitutional, we think that the Fourteenth Amendment ought to have been read from 1920 onward as rendering gender-discriminatory civil rights laws unconstitutional.<sup>204</sup> Since the domestic relations exception to federal jurisdiction is inconsistent with the post-1920 promise of gender equality in the Fourteenth Amendment, we think both Congress and the Supreme Court could and should abolish the domestic relations exception to federal jurisdiction in all remaining respects.

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<sup>204</sup> Steven G. Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).